IN THE UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 25

In the Matter of **Gavilon Grain, LLC,** **Respondent,** **and** **LABORERS' INTERATIONAL UNION OF NORTH AMERICA, LOCAL 1392** **Charging Party.**	**CASE NO.: 25-CA-264907** **25-CA-265798**

COUNSEL FOR THE CHARGING PARTY LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1392'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Submitted By
K. Grace Stranch
David O' Brien Suetholz
Counsel for Charging Party
Branstetter, Stranch &
Jennings PLLC
223 Rosa L Parks Avenue
Nashville, TN 37203
Tel: (615)254-8801
Email: Graces@bsjfirm.com

I. OVERVIEW OF THE CASE

This case is a classic example of an employer using tried and true methods to stop a union organizing campaign. Gavilon Grain, LLC (Employer or Respondent) terminated employees, decreased benefits, and created more onerous and rigorous terms of conditions on its employees to stop the facility from unionizing.[1] Employees were prohibited from storing items in the Respondent's warehouse, prohibited from clocking in prior to 6:45 am, and had their ashtray and smoking area removed.[2] The Employer required significantly more cleaning and heavily scrutinized every aspect of their work assignments.[3] The Employer also terminated individuals supportive of the union, including a key organizer, Zachary Baxter.[4] The Employer's actions were successful and left the employees "scared and overworked."[5] The resulting election results in favor of the Respondent were inevitable after such a terrorizing campaign.

The hearing in this case was held before Judge Geoffrey Carter based upon General Counsel's Complaint, issued November 25, 2020, in Case 25-CA-264907 and 25-CA 265798, filed by the Laborers' International Union of North America, Local 1392 (Charging Party or Union). The trial commenced via Zoom on February 22, 2021 and concluded on February 23, 2021. The evidence overwhelmingly supports the Charging Party and General Counsel's position that the Respondent engaged in multiple unfair labor practices in order to stop its employees from

[1] See, Cases 25-CA-264907 and 25-CA 265798, Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing (November 25, 2020).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] Transcript at 286 (Herein after Tr. at _)

organizing. The Charging Party asks that the Judge find merit in all allegations and award the remedies requested in the General Counsel's Complaint, including a notice posting, for Respondent to cease its unlawful conduct, to return employees working conditions to the status quo, and to reinstate employee Zachary Baxter and make him whole.

II. RELEVANT FACTS[6]

A. Respondent's Business

The Respondent is engaged in the purchase, sale, and storage of agricultural commodities and operates a grain elevator in the facility in Maceo, KY (facility).[7] The employees are responsible for loading and unloading grain barges.[8] Throughout the Union campaign, Trevor Hamilton was the location manager, Tom Lechtenberg was the Regional Operations Manager, and Derrick Fanton was the Area Superintendent.[9] Harold Baxter was the Assistant Superintendent until shortly after the Union requested voluntary recognition.[10]

B. Employees Engage in Protected, Concerted Activity and Begin a Union Organizing Drive

In July 2020, Zachary Baxter reached out to the Union because he wanted the employees to "have a say" and to "have a backbone with the company instead of just being walked over.[11] Vince Casey, the business manager of the Union, spoke with Baxter and explained the need for solid interest in the Union and agreed to set up a meeting to discuss what the Union could and

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[6] The facts are supported by the record in this case. The transcript to the hearing is cited as Tr. at _. The General Counsel's exhibits are cited as G.C. _. Respondent's Exhibits are cited as R._. Charging Party Union's exhibits are cited as U. , Joint Exhibits are cites as Jt. Ex. __).
[7] Tr. at 18, Jt. Ex. 1.
[8] Tr. at 18.
[9] See, Cases 25-CA-264907 and 25-CA 265798, Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing (November 25, 2020).
[10] Tr. at 19, 68.
[11] Tr. at 34, 35.

could not do for the employees.[12] On July 22, 2020, Zachary Baxter, Patrick Baxter, Kimmy Henning, and James Hamm met with Casey to learn more about collective bargaining .[13] Harold Baxter, their direct supervisor, and the father of Zachary and Patrick Baxter, also attended this meeting.[14] After the success of the first meeting, a second meeting was scheduled for August 11, 2020. [15] Harold Baxter was present at this meeting, but again, he was more of an observer than a participant. [16] At the conclusion of this meeting, the Union had received all of the signed recognition cards for the unit and provided Union t-shirts for the employees to wear to work the next day.[17] Casey explained to the employees that he would visit the facility the next day and request voluntary recognition from the Respondent.[18]

On August 12, 2020, Casey arrived at the facility and briefly met with the employees who were wearing their Union t-shirts and hats.[19] After speaking with the employees, Casey met with Hamilton and informed him he had 100% of the recognition cards signed and requested voluntary recognition of the Union.[20] Hamilton informed Casey he would need to reach out to his superiors and was not authorized to voluntarily recognize the Union.[21] Upon Casey's departure, Hamilton contacted Harold Baxter to question him about his knowledge about the Union.[22] Shortly thereafter, management told Harold he needed to explain to the employees negative

[12] Tr. at 279-280.
[13] Tr. at 36, 131-132, 150-151, 176-177, 280-281.
[14] Tr. at 176-177.
[15] Tr. at 132.
[16] Tr. at 132.
[17] Tr. at 281.
[18] Tr. at 281.
[19] Tr. at 282.
[20] Tr. at 282.
[21] Tr. at 282.
[22] Tr. at 100.

aspects of joining a union.[23] Lechtenberg called Harold Baxter again that evening to ask more information about the Union.[24]

On August 14, the Union served Respondent with the Petition in Case 25-RC-264702.[25] On September 18, the requisite ballots were mailed to employees.[26] On October 20, the ballots were counted and the Union lost the election three votes to one with one non-determinative challenged ballot.[27]

C. Respondent Responds to Union Campaign by Imposing More Onerous Working Conditions

a. Respondent Begins to Strictly Oversee Employees' Work

Prior to the Union requesting voluntary recognition, the employees had little interaction with supervisors beyond Harold Baxter.[28] Hamilton and Fanton were rarely present at the facility prior to the request for voluntary recognition on August 12.[29] After the Union requested voluntary recognition, either Hamilton or Fanton was always present at the facility.[30] The employee tailgate meetings prior to August 12th were only supervised by Harold Baxter, but after the 12th, Hamilton or Fanton began to attend. [31] The Respondent also began to monitor the employees' assignments, overseeing them when they were in the pit or when they were unloading the barges.[32] Hamilton began assigning tasks to employees and demanding immediate completion, deviating from his role and responsibilities prior to the Union's request for voluntary

[23] Tr. at 101-102; 170-180; 240-241.
[24] Tr. at 180.
[25] Jt. Ex. 1.
[26] Jt. Ex. 1.
[27] Jt. Ex. 1.
[28] Tr. at 136.
[29] Tr. at 136, 237.
[30] Tr. at 137, 183.
[31] Tr. at 49, 130, 180.
[32] Tr. at 54, 84.

recognition.[33] The employees were constantly monitored and micromanaged. [34] Harold Baxter reached out to the Regional Operations Manager Lechtenberg to express concerns about the employees unloading barges and the added assignments as well as the surveillance. [35]

b. Respondent Adds Additional Stringent Cleaning Requirements

Prior to the recognition, the employees' housekeeping tasks, such as cleaning, were performed at the end of the day. After the Union's request for recognition, the employees were instructed to clean numerous times throughout the day.[36] The requests for this repetitive and more consistent cleaning were relayed to the employees the day after the Union requested voluntary recognition.[37] The more onerous cleaning requirements communicated to the employees that their work life would get more difficult since they chose to support the Union.

D. Respondent Retaliates by Changing Employees' Terms and Conditions of Employment

a. Respondent Removes and Relocates Employees' Long Standing Smoking Area to next to the Dumpster

The employees' smoking break area has been in the same location at Respondent's facility for over ten years. [38] Dow Latham, Tom Lechtenberg's boss, was aware of this break area and placed an awning over it to make it more comfortable. [39] The policy governing smoking at the facility has been in place since 2013.[40] The smoking area has never received any safety violations by OSHA, or been considered a safety hazard prior to the Union's request for recognition.[41] Hamilton never moved or discussed the smoking area being a safety issue prior to

[33] Tr. at 136, 184.
[34] Tr. at 41, 52, 53.
[35] Tr. at 181.
[36] Tr. at 44.
[37] Tr. at 237.
[38] GC. Ex. 5; Tr. at 47; R. Ex. 7
[39] Tr. at 193.
[40] Tr. at 119.
[41] Tr. at 49, 58, 106.

August 12th.[42] Similarly, Fanton's visits to the facility in June and before August 12 never prompted him to remove or discuss safety issues with the smoking area.[43]

After the Union requested recognition, on August 17th, the employees were informed that the smoking area had been relocated, but were never informed why it had been removed.[44] Hamilton simply moved the smoking area away from the employees' break area to beside a dumpster.[45] The message the Employer communicated to the employees was clear—support the Union and conditions get worse.

b. Respondent Requires Immediate Removal of an Employee's Possessions from Respondent's Warehouse

Prior to the request for Union recognition, an employee, Kenny Cross, had permission to store his belongings in the Respondent's warehouse.[46] Cross had permission to store his belongings from the Respondent and the farmer renting the warehouse.[47] The day after the Union requested recognition, Hamilton gave the order for Cross to remove his belongings from the warehouse within 24 hours.[48] Again, the message from the Employer was clear, support the Union and conditions get worse.

c. Respondent Ceases the Long-Held Practice of Employees Clocking in before 6:45am

It was typical for employees to get in early, clock in and get their equipment ready for the day.[49] After the Union requested recognition, the employees were informed by the scale operator they could no longer clock in before 6:45.[50] Prior to August 12, there was no set time for

[42] Tr. at 219.
[43] Tr. at 275.
[44] Tr. at 50, 108, 139, 275; GC. Ex. 6.
[45] Tr. at 182.
[46] Tr. at 44, 285.
[47] Tr. at 140, 187.
[48] Tr. at 140, 188.
[49] Tr. at 49.
[50] Tr. at 51.

employees to arrive and they were able to clock in early to gather up their equipment for the day.[51] Fanton made the decision on August 12 to no longer allow the employees to clock in early. [52] The Employer's unilateral change communicated to the employees that supporting the Union had negative consequences.

E. Respondent terminates Zachary Baxter, the Lead Organizer of the Union Campaign

Zachary Baxter has worked part time for the Respondent in the past.[53] On August 10th, Baxter informed Harold Baxter he had another job and said he would be working part time moving forward. [54] Prior to this conversation, Baxter had discussed working part time with Hamilton, who said it was ok. [55] Baxter planned on working his other job full time and working at the Respondent's facility nights and weekends for the additional income.[56]

After the Union requested voluntary recognition, Baxter was no longer allowed to work part time and was terminated.[57] His last day of work was August 14, only two days after the Union requested recognition. [58] The constructive discharge of Zarchary Baxter, the plant manger's son shocked the bargaining unit and shattered the organizing drive.

III. ARGUMENT

a. Legal Standard

Under Section 8(a)(1) of the Act it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. 29

[51] Tr. at 243.
[52] Tr. at 186.
[53] Tr. at 130,167; GC. Ex. 3(a)-(f).
[54] Tr. at 81, 82.
[55] Tr. at 83.
[56] Tr. at 86, 87, 201.
[57] Tr. at 285.
[58] Tr. at 191.

U.S.C. §158(a)(1). Those rights include the right to organize, to form, join, or assist a labor organization, to bargain collectively, to engage in other concerted activities for mutual aid or protection, or to refrain from any or all of these activities.[59] This is a broad prohibition on employer interference. An employer may not threaten employees or impose adverse consequences as a result of the employee engaging in concerted protected activity. Threatening remarks, imposition of onerous or burdensome work, withdrawing or curtailing pre-election privileges and favors based upon an employees' union activity is a violation under the Act.[60] An employer may also not discharge, constructively discharge, suspend, layoff, fail to recall from layoff, demote, discipline, or take any other adverse action against employees because of their protected, concerted activities.

Under Section 8(a)(3) of the Act, it is unlawful for an employer to retaliate against union or other protected, concerted activity. To establish a prima facie case of retaliation or discrimination under Section 8(a)(3), the evidence must establish four elements: 1) the employee was engaged in protected activity; 2) the employer had knowledge of that activity; 3) the employer showed animus related to that protected concerted activity; and 4) the protected activity was a motivating factor for the adverse employment action.[61]

An employer does not violate Section 8(a)(3) when it would have taken the same action for legitimate business reasons.[62] But it is not enough for the employer to simply produce a

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[59] 29 U.S.C. § 157.
[60] N. L. R. B. v. Dixie Gas, Inc., 323 F.2d 433, 434 (5th Cir. 1963); N.L.R.B. v. Bestway Trucking, Inc., 22 F.3d 177, 181 (7th Cir. 1994); Smithers Tire, 308 NLRB 72(1992); Wyman-Gordon Co. v. NLRB, 654 F. 2d 134, 145 (1st Cir. 1981).
[61] See, Wright Line, 251 NLRB 1083, 1089 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). See also AdvancePierre Foods, 366 NLRB No. 133, slip op. at 16 (July 19, 2018).
[62] Wright Line at 1089.

legitimate basis for the adverse employment action or to show that reason factored into its decision.[63]Rather, it "must persuade that the action would have taken place absent protected conduct by a preponderance of the evidence."[64] The Board may infer animus from the employer's pretextual reasons.[65] Certainly, where the surrounding facts support it, the Board may assume an unlawful motivation was causally connected to the adverse action.[66]

Evidence that a discriminatory motive that "contributed to" an employer's decision to take adverse action against the employee may include: (1) statements of animus directed to the employee or about the employee's protected activities (see, e.g., Austal USA, LLC, 356 NLRB No. 65, slip op. at p. 1 (Dec. 30, 2010) (unlawful motivation found where HR director directly interrogated and threatened union activist, and supervisors told activist that management was "after her" because of her union activities)); (2) statements by the employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employee (see, e.g., Wells Fargo Armored Services Corp., 322 NLRB 616, 616 (1996) (unlawful motivation found where employer unlawfully threatened to discharge striking employees and then disciplined a remaining striker following the threat)); (3) close timing between discovery of the employee's protected activities and the discipline (see, e.g., Traction Wholesale Center Co., Inc. v. NLRB, 216 F.3d 92, 99 (D.C. Cir. 2000); (4) the existence of other unfair labor practices

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[63] T. Steele Construction, Inc., 348 NLRB 1173, 1184 (2006).

[64] Weldun Int'l, 321 NLRB 733 (1996) (internal quotations omitted), enfd. in relevant part 165 F.3d 28 (6th Cir. 1998). See NLRB v. Transportation Management Corp., 462 U.S. 393 (1983) (approving Wright Line and rejecting employer's claim
that its burden in making out an affirmative defense is met by demonstration of a legitimate basis for the adverse employment action).

[65]Electrolux Home Products, 368 NLRB No. 34, slip op. at 3 (2019); DHL Express, 360 NLRB 730 (2014).

[66] Electrolux at 3; *Rood Trucking Co.*, 342 NLRB 895, 897-898 (2004) .

that demonstrate that the employer's animus has led to unlawful actions (see, e.g., Mid-Mountain Foods, 332 NLRB 251, 251 n.2, passim (2000), enfd. mem. 11 Fed. Appx. 372 (4th Cir. 2001); or (5) evidence that the employer's asserted reason for the employee's discipline was pretextual, e.g., disparate treatment, shifting explanations for the adverse action, failure to do a thorough investigation, or providing a non-discriminatory explanation that defies logic or is clearly baseless.[67]

b. Respondent Violated the Act by Unlawfully Increasing Supervision and Imposing More Onerous Working Conditions in Retaliation for the Employees' Union Activity

Respondent's implementation of onerous working conditions and increased supervision directly after the Union sought voluntary recognition is a clear example of an employer trying to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. 29 U.S.C. §158(a)(1). The Board has held that increased surveillance and the creation of more onerous working conditions is a violation of the Act if predicated upon retaliation for employees' union activity.[68] The Respondent did not provide any credible explanation why it changed significant portions of its operating procedures directly after the Union asked for voluntary

[67] (see, e.g., Lucky Cab Company, 360 NLRB No. 43 (Feb. 20, 2014); ManorCare Health 19 Services – Easton, 356 NLRB No. 39, slip op. at p. 3 (Dec. 1, 2010); Greco & Haines, Inc., 306 NLRB 634, 634 (1992); Wright Line, 251 NLRB at 1088, n.12, citing Shattuck Denn Mining Co. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966); Cincinnati Truck Center, 315 NLRB 554, 556-557 (1994), enfd. sub nom. NLRB v. Transmart, Inc., 117 F.3d 1421 (6th Cir. 1997)).

[68] N. L. R. B. v. Dixie Gas, Inc., 323 F.2d 433, 434 (5th Cir. 1963)(Violation for more onerous working conditions); N.L.R.B. v. Bestway Trucking, Inc., 22 F.3d 177, 181(Violation for more onerous working conditions); *Palagonia Bakery Co., Inc.,* 339 NLRB 515, 528 (2003)(Violation for the Employer following the employee around the facility and closer scrutiny); *Chinese Daily News,* 346 NLRB 906, 909 (2006) (Increased work assignments were a violation in response to employees' union activity).

recognition. The arguments that were presented by the Respondent reek of pretext that cannot be successfully divorced from the timing of employees' protected activity.

There is no question as to whether the employees were engaged in protected activity. On August 12, 2020, Casey presented to the Respondent signed voluntary recognition cards for all employees in the proposed bargaining unit.[69] This, coupled with the employees wearing union paraphernalia, paints a clear picture that employees were engaged in protected activity. The Respondent had the requisite knowledge of the concerted activity because it was directly brought to its attention verbally and visually. Further, any doubt as to the Respondent's knowledge of the activity should be dispelled by the fact the Company held numerous meetings focused on why employees should cease their support of the Union.

The animus is clear when the actions are viewed in conjunction with the close proximity to the Employer's discovery of the employees' engaging in protected activity. A short amount of time between the adverse action and the knowledge of the employee's protected activity is circumstantial evidence of animus.[70] The Employer did not require excessive cleaning nor did it constantly surveil the employees until after the Union requested voluntary recognition.[71] To require these actions on the same day the Union requested voluntary recognition and the proceeding days provides a clear nexus between the Respondent's actions based on animus over the employees' protected activity. The Company's changes were made to punish the employees for daring to organize and to discourage them from forming a Union.

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[69] Tr. at 281, 282.
[70] Electrolux Home Products, 368 NLRB No. 34; Traction Wholesale Center Co., Inc. v. NLRB, 216 F.3d 92, 99 (D.C. Cir. 2000).
[71] Traction Wholesale Center Co., Inc. v. NLRB, 216 F.3d 92, 99 (D.C. Cir. 2000)

The Respondent argued that Harold Baxter was lax on cleaning and that the only reason there was more surveillance was because they needed additional guidance based upon Harold Baxter's termination. However, both of the reactions to the organizing drive by the Company started prior to the termination of Harold Baxter and as soon as the protected activity was apparent. In fact, the surveillance was such an issue that Harold Baxter reached out to Regional Operations Manager Lechtenberg to detail how the Company's actions were slowing down unloading the barges. [72] No explanation was given to the employees as to why they needed to excessively and repetitively clean or why they were being surveilled at all times. As the employees had no past reprimands or recent reprimands surrounding their work necessitating additional cleaning or further inspection, the most rational interpretation of these actions is that they were retaliation for the employees engaging in their protected concerted activity.

Prior to seeking voluntary recognition, the employees' housekeeping tasks, such as cleaning were performed at the end of the day. After the Union's request for recognition, the employees were instructed to clean numerous times throughout the day.[73] The requests for a more thorough cleaning were relayed to the employees the day after the Union requested voluntary recognition.[74] The employees were never given notice that their cleaning had been inadequate or was potentially creating a hazard prior to the Union's request for voluntary recognition.

[72] Tr. at 181.
[73] Tr. at 44.
[74] Tr. at 237.

c. Respondent Violated the Act by Changing the Employees' Terms and Conditions of Employment in Retaliation for the Employees' Union Activity

Changes made to the terms and conditions in retaliation of an employees' union activity violates the Act.[75] Respondent swiftly made numerous changes directly following the Union's request for voluntary recognition. After the Union approached the employer, the Employer requested Cross move his belongings from their warehouse and changed the clock in policy. The following day, Hamilton moved the smoking area that had been in the same place for over a decade. Hamilton later claimed he decided to move the smoking area predicated upon a 2013 smoking policy. Both Fanton and Hamilton had been on the site for significant time prior to these changes and yet both waited to implement the changes until the day of and the day after the Union sought voluntary recognition. The timing is too suspect to be anything but retaliation for the employees' concerted activities and must be seen for what it truly is, a violation of the Act.

d. Respondent Unlawfully Terminated Zachary Baxter in Retaliation for his Concerted Activities

Zachary Baxter's termination was in retaliation for his concerted activities. Under the *Wright Line* analysis, it is evident that the Respondent terminated Baxter because it (1) knew about the employee's protected union activity, (2) expressed animus towards the union, and (3) the anti-union animus was a motivating reason for the adverse employee action.[76]

There is no question that Zachary Baxter was a supporter of the Union. He made it known and wore his Union shirt the first day the Union asked for voluntary recognition.[77] The

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[75] *Advertisers Manufacturing,* 280 NLRB 1185 (1986); N. L. R. B. v. Dixie Gas, Inc., 323 F.2d 433, 434 (5th Cir. 1963).
[76] See, Wright Line, 251 NLRB 1083, 1089 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). See also AdvancePierre Foods, 366 NLRB No. 133, slip op. at 16 (July 19, 2018).
[77] Tr. at 38

Employer's animus, as detailed further above, was evident based upon their immediate increase of supervision, demands for increased cleaning, and removal of past privileges including the location of the smoking break area, clocking in early, and the removal of Cross' personal belongings from the Company's warehouse.

Animus is the only reasonable explanation for Baxter's termination two days after the Union requested voluntary recognition. Prior to the Union's request for recognition, Baxter had discussed working part time with Hamilton, who responded in the affirmative, "ok." [78] After this discussion, on August 10th, Baxter informed Harold Baxter he had found another job and would be working part time moving forward. [79] He also discussed his plans with Patrick Baxter, who like Harold Baxter, corroborated his understanding. Baxter planned to work as many hours as possible with his new job and with the Respondent because he wanted the additional income.[80] Two days after the Union sought recognition, Baxter was told he would no longer be allowed to work part time.[81] What had changed? The answer is clear, Baxter's involvement with the Union was enough for the Respondent to terminate a seasoned employee in the midst of the busy season. An employee that had regularly worked part time in the past. The fact Baxter's original approval was from Hamilton, and not Harold Baxter, shows his termination two days after the Union sought voluntary recognition was directly related and motivated by his concerted activities in violation of the Act. Zachary Baxter's unlawful termination fatally wounded the Union's organizing drive.

[78] Tr. at 83.
[79] Tr. at 81, 82.
[80] Tr. at 86,87, 201.
[81] Tr. at 285.

IV. CONCLUSION AND REQUEST FOR RELIEF

The Respondent's actions during the organizing campaign left the employees "scared and overworked" and violated Section 8(a)(3) and (1) of the Act as described above. [82] The Union respectfully requests the Judge find merit in all allegations and award remedies requested in the General Counsel's Complaint, including a notice posting, for Respondent to cease its unlawful conduct, to return employees working conditions to the status quo, and to reinstate employee Zachary Baxter and make him whole. Counsel also requests any other relief the Judge deems appropriate.

Respectfully Submitted,

/s/ K. Grace Stranch
K. Grace Stranch
David O'Brien Suetholz
Branstetter, Stranch & Jennings PLLC
223 Rosa L Parks Avenue
Nashville, TN 37203
Tel: (615)254-8801
Email: Graces@bsjfirm.com

[82] Tr. at 286.